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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 19 and 35**

**[FAR Case 2012-015; Docket 2012-0015; Sequence 1]**

**RIN: 9000-AM33**

**Federal Acquisition Regulation; Small Business Set Asides  
for Research and Development Contracts**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to clarify that contracting officers shall set aside acquisitions for research and development, when there is also a reasonable expectation, as a result of market research, that there are small businesses capable of providing the best scientific and technological approaches.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert date 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2012-015 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-015." Select the link "Submit a Comment" that corresponds with "FAR Case 2012-015." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-015" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7<sup>th</sup> Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR Case 2012-015, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Karlos Morgan, Procurement Analyst, at 202-501-2364, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2012-015.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to revise paragraph (b)(2) of FAR 19.502-2, "Total small business set-asides," to clarify that contracting officers shall set aside acquisitions for research and development (R&D) in excess of the simplified acquisition threshold when the market research conducted in accordance with FAR part 10 indicates there are small businesses capable of providing the best scientific and technological approaches. It is also proposed that FAR 35.004 be amended to include a reference to this FAR cite, because this area of the FAR addresses the steps Federal agencies may use to expand sources for R&D support.

This proposed rule responds to a request from the Small Business Administration (SBA) to review the last sentence in FAR 19.502(b)(2) which reads: "In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules." The SBA advises that this language has been interpreted as an additional and unique condition that must be met before a contracting officer can proceed with a small business set-aside for research and development.

FAR 19.502-2(b) establishes the general requirements for a total small business set-asides above the simplified acquisition threshold: (1) That offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns; and (2) That the award from the set-aside will be made at fair market prices.

This rule proposes to further clarify that the basis for the contracting officer's decision to set-aside or not to set-aside an acquisition for R&D support above the simplified acquisition threshold lies in the objective evidence obtained from the market research conducted. This clarification is intended to remove the potential barrier for small business previously noted by the SBA, as the requirement to conduct market research in advance of a small business set-aside is not a new or additional requirement, and applies to all small business set-asides.

## **II. Discussion and Analysis**

DoD, GSA, and NASA are proposing to amend FAR 19.502-2, "Setting aside acquisitions" by redesignating the last sentence in paragraph (b)(2) as a new paragraph (b)(3), to clarify that for R&D small business set-asides, there must be a reasonable expectation that, as a result of the market research performed, small businesses are capable of providing the best scientific and technological approaches.

The additional statement "consistent with the demands of the proposed acquisition for the best mix of cost, performance, and schedules" has been removed.

FAR 35.004 is also amended to add a new reference at the end of paragraph (b) to 19.502(b)(3), for guidance on R&D set-asides.

### **III. Executive Order 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

The Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) do not expect this proposed rule to have a significant economic impact on a substantial number

of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this change will not have a significant effect beyond the internal operating procedures of the Federal Government nor will it have a significant cost or administrative impact on contractors or offerors. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2015-015), in correspondence.

#### **V. Paperwork Reduction Act**

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR Parts 19 and 35**

Government procurement.

Dated: August 7, 2012

Laura Auletta,  
Director,  
Office of Governmentwide  
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Office of Acquisition Policy,  
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 19 and 35 as set forth below:

**PART 19-SMALL BUSINESS PROGRAMS**

1. The authority citation for 48 CFR parts 19 and 35 is revised to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 19.502-2 by revising paragraph (b) to read as follows:

**19.502-2 Total small business set-asides.**

\* \* \* \* \*

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). The contracting officer shall set aside any acquisition over the simplified acquisition threshold for small business participation when there is a reasonable expectation—

(1) That offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (see paragraph (c) of this section);

(2) That award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502-3 as to partial set-asides). Although past acquisition history of an item or similar items is always important, it is not the



only factor to be considered in determining whether a reasonable expectation exists; and

(3) When considering research and development small business set-asides, as a result of the market research performed in accordance with part 10, that there are small businesses capable of providing the best scientific and technological approaches.

\* \* \* \* \*

3. Amend section 35.004 by adding paragraph (c) to read as follows:

**35.004 Publicizing requirements and expanding research and development sources.**

\* \* \* \* \*

(c) See 19.502(b)(3) for information regarding set-asides of R&D requirements.

**[BILLING CODE 6820-EP]**

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